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IN THE

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA

Respondent

v.

EARL LAVELL FAIRCLOTH,
GERALD E. MICHAEL,
and LATEN GENE REAVES

Petitioner

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COUNSEL LISTED ON INSIDE COVER

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

James L. Nelson, Esquire
NELSON, SMITH AND HALL
Post Office Box 1767
Wilmington, North Carolina 28402
Counsel for Reaves

W. Osborne Lee, Jr., Esquire
David F. Branch, Jr., Esquire
LEE AND LEE
407 North Elm Street
Post Office Box 1069
Lumberton, North Carolina 28358
Counsel for Reaves

John Richard Newton, Esquire
502 Market Street
Wilmington, North Carolina 28401
Counsel for Faircloth

Renn Drumm, Jr., Esquire
400 NCNB Plaza
Winston-Salem, North Carolina 27101
Counsel for Michael

QUESTIONS PRESENTED FOR REVIEW

I. Are co-defendants represented by the same retained counsel and charged with conspiracy entitled to a new trial when the trial court fails to conduct an inquiry with respect to the joint representation of the co-defendants as mandated by F.R. Cr. P. 44(c)?

II. Whether the evidence is sufficient to support the conviction of the defendants for importation of methaqualone when the conviction is based upon evidence less probative than evidence previously held insufficient to support convictions for importation in both the Fifth and Ninth Circuits?

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JURISDICTIONAL STATEMENT

This petition is from a 27 May 1982 affirmance by the United States Court of Appeals for the Fourth Circuit of a conviction in Federal District Court. The Fourth Circuit decision is appended to this petition. Jurisdiction is granted by 28 U.S.C. 1254(1). Petition to rehear was denied on 29 July 1982.

AUTHORITIES, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AUTHORITIES:

Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980). 16

Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457 (1942). 16

Jackson v Virginia, 443 U.S. 307, 99 S. Ct. 2781, (1979) 21

United States v. Carrigan, 543 F.2d 1053 (2nd Cir. 1976). 14

United States v. Carrion, 457 F.2d 200 (9th Cir. 1972). 24

Unites States v. Foto, 591 F.2d 1091 (5th Cir. 1979). 24

United States v. Lauriw, 568 F.2d 98 (8th Cir. 1977). 16

United States v.Maslanka, 501 F.2d 1091 (5th Cir. 1979). 24

United States v. Meyer, 432 F.2d 1000 (9th Cir. 1970). 23

UNITED STATES CONSTITUTION:

> Amend. VI: In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defense.

STATUTES:

> F.R. Cr. P. 44(c)
>
> Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

21 U.S.C. 952(a) (See appendix for text)

STATEMENT OF THE CASE

Laten Gene Reaves, Earl Lavell Faircloth, and Gerald E. Michael are the petitioners herein and will be referred to in this petition as "defendants". Defendants and others were convicted in United States District Court for the Eastern District of North Carolina for conspiracy to import and to possess with intent to distribute methaqualone and marijuana, importation and aiding and abetting the importation of methaqualone (quaaludes), and the importation and aiding and abetting the importation of marijuana, however, the defendant Hu Chang, who was the alleged pilot of the airplane carrying contraband, was acquitted on the conspiracy charge. These petitioners appealed their

convictions to the United States Court of Appeals for the Fourth Circuit. That Court affirmed in part, but reversed the convictions for importation of marijuana for lack of evidence that the marijuana was imported from a place outside the United States.

The relevant facts for consideration of the first question presented in this petition are quite terse. Roger Suggs and Laten Gene Reaves were both represented by the same privately retained attorney during the pretrial and trial stages of this case. Trial commenced on 23 February 1981, some thirteen months after the effective date of F.R. Cr. P. 44(c). It is readily admitted and apparent from the record that no inquiry was made by the district court with

respect to the joint representation of the two defendants. Further, neither defendant was personally advised of his right to separate representation at any stage of the proceedings.

The relevant facts of the second question posed in this petition focus upon the second count in the indictment alleging the defendants violated federal law by engaging in the importation of methaqualone. Both the marijuana and the methaqualone were found in a Lodestar plane at the Long Beach Airport. The Court of Appeals for the Fourth Circuit reversed the convictions for importation of marijuana but upheld the convictions for the importation of methaqualone. Evidence submitted to the jury on the issues of importation of

methaqualone and the importation of marijuana was virtually identical with the exception of the testimony of a forensic chemist, Edward Franzosa of the Drug Enforcement Administration. He testified over proper objection that the methaqualone tablets seized in this case were manufactured by the same stamping machine which manufactured a methaqualone tablet previously sent to the Drug Enforcement Administration laboratory in 1979 by a DEA agent in Colombia. No evidence indicated the DEA agent in Colombia seized the stamping machine or the sample from a clandestine drug operation in Colombia or anywhere else outside the United States. Rather, the DEA agent received the sample from a police officer in Colombia and no one knows where

the officer obtained the sample tablet or where it was manufactured. There is no evidence by any DEA agent that the sample received from the police officer was manufactured outside the United States.

Franzosa did not state where the sample quaalude was manufactured. In addition thereto, the expert readily admitted that his sample collection, to which he compared confiscated samples, did not contain samples from all illicit laboratories in the United States. Further, evidence offered by the government on the charges of importation of marijuana and quaaludes which were seized on the same aircraft consisted of the words "This Side Up" in Spanish on the boxes in which the quaaludes were found, and two batteries

labelled in Spanish, but with no indication of origin.

ARGUMENT

I. CO-DEFENDANTS REPRESENTED BY THE SAME RETAINED COUNSEL AND CHARGED WITH CONSPIRACY ARE ENTITLED TO A NEW TRIAL WHEN THE TRIAL COURT FAILS TO CONDUCT AN INQUIRY WITH RESPECT TO THE JOINT REPRESENTATION OF THE CO-DEFENDANTS AS MANDATED BY F.R. Cr. P. 44(c).

F.R. Cr. P. 44(c), effective 1 December 1980, mandates that whenever co-defendants are represented by the same retained counsel, the trial court shall conduct an inquiry with respect to such joint representation. The trial of the co-defendants commenced on 23 February 1981, some thirteen months after the effective date of F.R. Cr. P. 44(c). The evidence is undisputed that no inquiry was made by either a magistrate or the trial judge prior to or during the trial of this case. Petitioner

asserts the language of the Rule is mandatory and squarely places the burden of initiating and conducting the inquiry concerning joint representation of co-defendants upon the court.

The underlying purpose of the enactment of the mandatory inquiry by the Court with respect to the joint representation of co-defendants by the same retained counsel pursuant to F.R. Cr. P. 44(c) was to establish a procedural hurdle in order to eliminate potential post-conviction claims by either defendant that joint representation deprived the accused of his Sixth Amendment right to effective assistance of counsel. To ignore this hurdle and fail to apply a per se rule of reversal in the absence of an inquiry by the court, is to reopen the

floodgate of post-conviction claims of ineffective assistance of counsel.

After reading the decision by the United States Court of Appeals for the Fourth Circuit in the case sub judice, one would conclude this burden rests not with the court but rather with the trial counsel and the defendants themselves. A reading of the Rule clearly indicates the contrary. It is expressly noted in the notes of the Advisory Committee on F.R. Cr. P. 44(c) that even the most diligent attorney may be unable to detect a potential conflict that arises due to the joint representation of co-defendants. Frequently, as expressed in United States v. Carrigan (concurring opinion), "most counsel must operate somewhat in the dark and feel their way

uncertainly to an understanding of what their clients may be called upon to meet upon a trial." 543 F.2d 1053, 1058 (1976). Rule 44(c) further mandates that the trial court, not the trial attorney or defendants, has a continuing obligation throughout the course of the trial to monitor any potential conflict of interest. A less demanding rule will not adequately protect each defendant's Sixth Amendment right to effective assistance of counsel. Moreover, to ignore this rule is to undermine the very purpose for which the rule was drafted.

Courts in numerous jurisdictions have been quick to note that "[i]n conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the

prosecution may, and sometimes do, operate unfairly against an individual defendant it is especially important that he be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance." Glasser vs. United States, 315 U.S. 60, 76, 62 S. Ct. 457, 474 (1942). With this premise in mind, Rule 44(c) of the Federal Rules of Criminal Procedure was drafted.

Prior to the enactment of Rule 44(c) numerous courts grappled with the chilling effect of dual representation in fact patterns analogous to the case sub judice. See Cuyler vs. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980); United States vs. Lauriw, 568 F.2d 98 (8th Cir. 1977). The issue of post-conviction appeals asserting

ineffective assistance of counsel previously hinged on whether the defendant was actually prejudiced by dual representation. With the passage of Rule 44(c) the emphasis clearly shifted requiring a per se rule of reversal when the trial court fails to shoulder its responsibility and conduct the necessary inquiry mandated by Rule 44(c).

Failure to reverse a conviction of a co-defendant represented by the same retained counsel absent an inquiry pursuant to Rule 44(c) is to circumvent the very purpose and spirit of the Rule. Rule 44(c) is designed to protect those least able to protect themselves by placing a reasonable burden on those charged with the responsibility of seeing that defendants get effective assistance of counsel. In order

to provide for a prompt disposition of criminal cases and avoid the numerous appeals premised on ineffective assistance of counsel, the trial court must, in accordance with Rule 44(c), conduct an inquiry when defendants are represented by the same retained counsel. It is essential that the Supreme Court of the United States invoke a per se rule of reversal when the trial court fails to comply with the provisions of Rule 44(c). For the foregoing reasons, it is respectfully submitted that the trial court's failure to comply with the provisions of Rule 44(c) requires a reversal of the conviction of the defendant.

II. THE EVIDENCE OFFERED AT THE TRIAL OF THE DEFENDANT WAS INSUFFICIENT TO SUPPORT THE CONVICTION FOR IMPORTATION OF METHAQUALONE.

The indictments upon which the defendants stand convicted allege that methaqualone and marijuana found on the Lodestar plane were imported into the United States from Colombia, South America. In support of this allegation, the government offered the expert testimony of a forensic chemist.

The essence of the chemist's testimony was not that the methaqualone tablets found on the plane were imported from or manufactured in Colombia, South America. Rather, the testimony of the chemist indicated that the methaqualone tablets seized in this case were manufactured by the same stamping machine which manufactured a methaqualone tablet sent to the

Drug Enforcement Administration laboratory in 1979 by a DEA agent in Colombia. To further complicate the matter, the DEA agent obtained the sample from a police officer. The government presented no evidence tending to show that this common stamping machine was situated in Colombia or a point outside the territorial limits of the United States.

The essential element of the crime of importation of a controlled substance is proof that a transfer of contraband occurred from a point outside the territorial limits of the United States to a destination point inside the United States, 21 U.S.C. 952. The testimony of the chemist tended to prove only one premise: that a methaqualone tablet of unknown origin

"matched" the methaqualone tablets seized from the Lodestar aircraft. This testimony on the issue of importation clearly falls short of standard for assessing the sufficiency of the evidence as espoused in Jackson v. Virginia 443 U.S. 307 (1979). Furthermore, the testimony of Franzosa was of no probative value on the issue of whether the transfer of the quaaludes occurred from a point outside the United States to a destination point inside the United States.

Other evidence offered in support of the importation convictions include the words "This Side Up" in Spanish on the boxes in which the quaaludes were discovered, and two batteries found in a flashlight which had a label printed in

Spanish including the words "Union Carbide Corp. U.S.A." Considering all this evidence in a light most favorable to the prosecution, the defendant respectfully submits a rational trier of fact could not have found importation beyond a reasonable doubt.

These facts are absolutely too speculative to allow a jury to pass upon them. This is particularly true in our present society, where millions of Spanish-speaking people live and where countless products are manufactured and distributed in this country for their use and consumption. The government offered no evidence with respect to the capacity of the airplane to import from outside the country.

In United States v. Meyer, 432 F.2d 1000 (9th Cir. 1970), the defendant was charged with smuggling sodium seconal capsules into the Unites States. Four boxes containing the capsules were found bearing the label "Mexico, D.F." On appeal, the Ninth Circuit held there was insufficient evidence to support the conviction. "Whether the boxes contained the seconal capsules when brought into the country and whether the seconal capsules were illegally imported are matters of pure conjecture." 432 F.2d 1000,1001.

The United States Court of Appeals for the Fifth Circuit reiterated the absolute necessity for the government to establish a viable connection between the defendant and the mode of entry allegedly used to bring

the contraband into the United States in order to support a conviction for importation. See United States v. Maslanka, 501 F.2d 208 (5th Cir. 1974), United States v. Foto, 591 F.2d 1091 (5th Cir. 1979). No such viable connection was established by the evidence in the case sub judice.

In United States v. Carrion, 457 F.2d 200 (9th Cir. 1972), the government presented the following evidence on the issue of importation when several hundred pounds of marijuana were discovered on an aircraft: (1) the boxes containing the marijuana had Spanish writing on them, (2) one defendant had a map of Mexico and a matchbook bearing an advertisement for a Mexican motel in his bag; (3) and another defendant carried in his wallet a slip of paper

bearing Spanish words. In addition thereto, the prosecution showed sufficient time had elapsed since the leasing of the aircraft to complete a round trip flight to Mexico.

The Court of Appeals for the Ninth Circuit held this evidence was insufficient as a matter of law to support a conviction for the importation of marijuana from Mexico. The focal point of the reversal hinged on the fact there was no evidence the defendant's plane had been seen in Mexico, and no circumstantial evidence tending to show the defendant's airplane had been in Mexico.

In the case sub judice the government alleged the contraband was brought into the United States by plane from Colombia.

However, no evidence was presented that the plane seized with the marijuana and methaqualone had the capacity to fly the long distance between Colombia and Long Beach, North Carolina. No flight charts were discovered on board the plane denoting the airways between Colombia and the United States. Further, there was no evidence whatsoever that the airplane carrying the contraband had been seen in Colombia, and no circumstantial evidence tending to show the airplane had been in Colombia. The absence of any such evidence accentuates the weakness of the charges of importation.

The irony of the published decision of this case by the United States Court of Appeals for the Fourth Circuit is the court readily admitted the insufficiency of the

evidence to support a conviction for importation of marijuana but concluded, in what is seemingly a contradiction, the evidence was sufficient to support a conviction for importation of methaqualone when all the contraband was found on the same aircraft. It would seem that the Court of Appeals considered the evidence on the charge of importation of marijuana and the charge of importation of methaqualone mutually exclusive. Defendant respectfully submits there is no rational basis for the Court of Appeals to have reached two contradicting decisions based upon the same evidence. The only additional evidence offered with respect to the charge of importation of methaqualone as opposed to the charge of importation of marijuana was

the testimony of the forensic chemist. Defendant reiterates the testimony of the chemist was of no probative value on the issue of importation.

To follow the logic of the Court of Appeals would lead one to the conclusion that because a nationalist Chinese, Hu Chang, was flying the aircraft that landed at the Long Beach Airport, the contraband was imported from China. Therefore, it is respectfully submitted that this Court reverse the conviction of the defendants for the importation of methaqualone and the aiding and abetting of the importation thereof due to the insufficiency of the evidence.

CONCLUSION

For the various legal reasons set forth in this brief, both individually and collectively, it is request that this petition for certiorari be granted.

By: James L. Nelson
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true copy of the foregoing Petition for Certiorari to the following:

The Honorable Samuel T. Currin
United States Attorney
Post Office Box 26897
Raleigh, North Carolina 27611

The Honorable James L. Blackburn
Special Assistant U. S. Attorney
Post Office Box 1507
Raleigh, North Carolina 27602

This 27th day of August, 1982.

Catherine Johnson

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